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WALLACE vs. EDWIN HARMSTAD, 44 PA. 492

In 1838 Arrison sold to four brothers Harmstad four adjoining lots, reserving out of each a yearly rent of $60, payable half-yearly, in January and July. Each grantee, entered on his lot and built a house on it. The deeds were executed in duplicate each being signed by both parties. A part of the bargain was that the rents might be redeemed at any time. In the deeds was a blank with respect to the time of redemption, which was explained by Arrison as meaning that there was no limit of time. Some time after the delivery of the deeds, they were procured by Arrison for the alleged purpose of having them recorded, and while out of the possession of the Harmstads the blanks were filled with the words, "within ten years from the date thereof," making redemption after ten years impossible. The first instalment of rent was paid July 1st, 1839, without knowledge by the Harmstads of the alteration. On the discovery of the alteration they refused to pay the subsequently accruing rent. Arrison by deed September 9th, 1839, conveyed the rent to Mrs. Alice Wallace. She distrained for the rent. This is replevin by Harmstad for the goods destrained.

In Arrison v. Oliver Harmstad, 2 Pa. 191, an action

for the ground rent on one of these lots was brought in the name of Arrison to the use of his grantee, Mrs. Lewis, of the rent. The first count was on the covenant in the deed; the second on a verbal contract, averring possession taken thereunder by the defendant; the third, for use and occupation, and the fourth for interest. It was held that the ownership of the land passed to Harmstad by the deed, and was not impaired by the fraudulent alteration of it, but the condition concerning rent had been avoided by that alteration. There could be no recovery on the covenant in the deed. Nor could there be a recovery on the 2d and 3d counts. Any contract to pay rent was merged in the deed. It did not emerge by a subsequent alteration of the deed. There can be no recovery for use and occupation, for the land is Harmstad's and he cannot be compelled to pay for the occupation of his own land. The fact that Mrs. Lewis was a *bona fide* purchaser of the rent did not make it enforceable.

In Joshua M. Wallace v. Joseph Harmstad, 15 Pa. 462, the rent payable by another of the brothers, Joseph Harmstad, was sued for in covenant by its assignee, Joshua M. Wallace. The first count declared on the deed as altered, and the second on the deed without the alteration. The court held the alteration of the deed prevented a recovery. It was suggested that there was negligence in not scoring the blank so as to prevent interpolation, and that, as Wallace had purchased subsequently to the alteration, and without knowledge of or reason to suspect it, he should be permitted to recover. "The law," says Gibson, C. J., would exact extreme vigilance did it require their employers (i. e. the employers of scriveners) to supervise the filling of the blanks."

With these two cases of failure to enforce the covenant or to recover, for use and occupation, before her, Mrs. Alice Harmstad attempted to obtain the rent by the exercise of the right of distress.

Woodward, J., states the view of Mrs. Wallace's counsel thus: The ground-rent is an estate, which vested in the grantor to whom it was reserved, at the instant of the conveyance, with the reservation, of the land. The subsequent alteration or destruction of this conveyance, did not destroy it. But, intrinsic to it, since it was a rent service was the right of distress. So long as it, the ground-rent exists, the right of distress exists. It seems that the defendant's (Mrs. Wallace's) avowry referred to the conveyance. But this, he said, was only for the "purpose of defining the estate and the amount of the rent."

Was the defining of the amount of the rent necessary in order to sustain the distress? Can one distain, for money, without being prepared to show for how much he distrains? If then, a reference to the Arrison deed was necessary to Arrison or his grantee to define the amount of the rent, in case a distress was made or an action brought for it, why did not the spoliation of the deed prevent this, like any other, use of it by the spoliator or his grantee? The court seems to have unnecessarily expended a vast amount of erudition.

The court addresses itself to the counsel's argument. Generally it concedes, a vested estate will survive the instrument of its creation. But, when that estate "lies in grant," that is, can only exist by virtue of a deed, devise, or record or by prescription, which is evidence of a deed, the case is otherwise. An incorporeal hereditament lies in grant. A rent-service is an incorporeal hereditament.

When the deed of grant which produces these incorporeal rights is lost or destroyed without fraud, secondary evidence is allowed of the deed. But, when it cannot be produced, because of fraudulent alteration or destruction, the fraudulent party cannot furnish secondary evidence. Hence says Woodward, J., holding only an incorporeal hereditament, creatable and created by a deed which has been fraudulently altered, Mrs. Wallace can no more

prove the existence of the rent-service, in order to maintain a distress, than in order to maintain covenant.

Woodward, J., seems to concede that, if an estate is not one which requires a grant, the destruction of the deed creating it would not destroy it. But, why should it not prevent the proof of the contents of the deed, and therefore, the proof of the coming into existence of the estate? How matters it, whether the estate *could* be created without deed, if in fact it *was* created by deed? If it *was* created by a deed which has been fraudulently altered, that it was so created should be deemed incapable of proof, and *quod non apparet non est.*

The distinction between transactions that must be by deed and those which may be oral, is, so far as the applicability of the principle that a fraudulent alteration of a writing forbids the enforcement of it, even in its unaltered form, irrelevant. Certain contracts *may* be either oral or written. If a writing is in fact adopted, will any one contend that, the writing being fraudulently changed, the fraudulent party may fall.back on the oral agreement which was embodied in the writing, and enforce it? Let it be conceded that, but for the statute of frauds, a feoffment with the reservation of rent might be unwritten. It does not follow that, if a deed were in fact adopted, recourse could be had after its spoliation to the oral agreement.

But, no sooner has the court said that an incorporeal hereditament, being created by a deed, is destroyed, when the deed is tampered with, and suggested that this was applicable to rents-service, than it quotes from Littleton, that if a man make a feoffment by deed or *without deed,* yielding to him and his heirs a certain rent, this is a rent service for which there is a right of distress. He also quotes from Lord Coke that "all rent services may be reserved without deed." Then a rent service is not an incorporeal hereditament which lies in grant.

Apparently, Woodward, J., supposes that if the rent re-

sulted from a contract, and that contract was expressed in the deed, the alteration of the deed would make unprovable the contract and irrecoverable the rent. He therefore says, "Rent service was an essential element of the feudal tenure." The feudal tenure, on the contrary, existed in innumerable instances, when there was no rent payable. Rent is only one form of service. While the duty of service of some sort was incident to the tenant's relation, that service was not necessarily a rent. Say Pollock and Maitland, in their History of English Law[1] "The service which the tenant (in socage) owes to his lord, may be merely nominal; he has no rent to pay, or has to give but a rose every year just by way of showing that the tenuhe exists * * * Or in truth there may well have been what in truth was a sale of the land; in return for a gross sum paid down a landowner has created a nominal tenure." Speaking of socage tenure, Holdsworth[2] says: "Generally a money rent is due, and occasionally agricultural services. This rent may be nominal or substantial; it may consist in the gift of something of real value, e. g. a pound of pepper, or of merely nominal value, e. g. a rose. Sometimes no rent at all, but only fealty, is due." Rent, then, was not an essential element of the feudal tenure. The justice makes no distinction between the various sorts of tenure, so laboriously distinguished by Blackstone,[3] Pollock and Maitland[4] and Holdsworth[5] and involving different sorts of liabilities of the tenant.

The justice endeavors to convince himself that the clement of contract did not exist, when land was conveyed by A to B in fee, with the reservation of a rent. The terms of the tenure, he suggests, were "dictated by a superior to

[1]Vol. 1, p. 271.
[2]History of English Law, p. 45.
[3]2 Comm. 59.
[4]History of English Law, Vol. 1, p. 207.
[5]History of English Law, Vol. 3, p. 27.

an inferior," as if A could compel B to accept a conveyance and to pay for it what services he, A, chose to designate. "It is very clear," he remarks (p. 497) that it would have been no answer to a distress to tell the lord that he had lost, or by his wrongful act avoided, the deed which expressed the reservation of his rent service." How is it clear? Was the effort ever made? And, if it was, and failed, was the failure not due to the fact that the courts had not yet developed the principle that the fraudulent alteration of a deed, prohibited the enforcement of the original deed? The justice speculates as to what would have happened, had the tenant denied the right to collect the rent because of an alteration of the deed. No such case was discovered by the justice. He invents a solution. "The reply would have been," he says, "that the rent-service depended on no formal reservation, but that it resulted by inherent necessity out of the tenure, and that distress was the inseparable incident." What hypothetical person would have made so stupid a reply? Did the rent depend on no reservation? What then determined whether the feoffment was without rent or with rent? or, if with rent, whether the rent was one pound or 100 or 1000 pounds? The reply that no reservation was necessary, would have been preposterous. To say that it did not need to be "formal" were to say nothing. To say that the rent, e. g. the specific rent of 478 pounds per annum resulted by inherent necessity out of the tenure is to talk nonsense. The tenure did not exist except by the concurrent act of the feoffor and the feoffee, and the reservation of the rent was an inseparable component of the indivisible act which produced the tenure. The rent-service did not result from the tenure, but the tenure resulted from the act of enfeoffing with the reservation of the rent and the acceptance of the feoffment by the party intended to be the feoffee. Says Williams[6] "Thus the nature and amount of the services

[6]Real Prop., 17 Intern. Edit., p. 46.

which could be required of free-holding tenants were determined by the agreements made between lords and tenants, or their respective predecessors when the tenure between them was created by the gift to the latter of fees to be held of the former; and these services were of innumerable kinds."

Having then gratuitously conceded to the defendant, that the rent did not arise by a reservation in the deed, but in some other mysterious way, and therefore that the fraudulent alteration of the deed did not prevent proof of the existence of the reservation of the rent, and of its amount, if the relation of lord and tenant was created by the Arrison deed, the next step in order to defeat the distress, will be to show that that deed did not create that relation.

One suggestion is that the statute *quia emptores terrarum*[7] has worked that result. That statute directs that "upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it"[8] "Thence forward" says Williams,[9] "it has been impossible to create a new tenure upon the grant of a fee; for a tenant in fee simple though enabled freely to part with his land by substituting another tenant in his place, is by this statute restrained from granting his land or any part thereof to another for an estate in fee simple to be held of himself."

But to the suggestion that the statute *Quia emptores terrarum* has prevented the establishment of the relation of lord and tenant between Arrison and Harmstad, the answer given by Woodward, J., is that which Ingersoll v. Sergeant, 1 Wh. 337, furnished him viz. that that statute

[7]18 Edward I. C. I., or statute of Westm. 3.
[8]2 Black. Comm., p. 91.
[9]Real Prop., p. 46.

did not and does not operate in Pennsylvania. He persists in suggesting that the rent-service does not arise by contract, and alleges that the rent-charge must have a contract to support it. On the contrary, the duty to pay the rent, in both cases, when it is a rent service and when it is not, arises only from contract. The right to destrain, for the former sort of rent, does not need to be contracted for; that for the latter sort, if it exists, is created by contract.

Well, since there is no statute against subinfeudation, to prevent the constitution of Harmstad the tenant of Arrison, and the rent reserved, a rent service, has anything else occurred to produce this effect? By a prodigy of acumen, the writer of the opinion discovers that the whole feudal system was overthrown by the Revolution; and hence the relation of landlord and tenant. He affirms that fealty is the essential feudal bond. That bond cannot exist without fealty. Does fealty exist? He inquires has any one in Pennsylvania ever rendered fealty? "What Pennsylvanian ever obtained," he victoriously asks, "his lands by "openly and humbly kneeling before his lord, being ungirt, uncovered and holding up his hands both together between these of the lord, who sat before him, and there professing that he did become his *man* from that day forth, for life and limb, and earthly honor, and then receiving a kiss from his lord." "This," he adds, "was the oath of fealty," the essential feudal bond. As E. Coppee Mitchell[10] points out, the language quoted as the oath of fealty, is the language not of fealty but of homage. The oath of fealty is given in Pollock and Maitland thus:[11] The tenant stands up with his hand on the gospels and says 'Hear this my lord, I will bear faith to you of life and member, goods, chattels and earthly worship, so help me God and these holy gospels of God.' "Some," the writers re-

[10]Real Estate in Pennsylvania.
[11]1History of English Law, p. 278.

mark, "add an express promise to do the service due for the tenement." The ceremony of homage was not performed by a woman tenant, and was originally performed only by military tenants, and having long ceased to have any meaning at all was in 1660, over 20 years prior to the grant of Pennsylvania to William Penn, abolished along with military tenures.[12] Military tenures never having existed in Pennsylvania, and for that reason, homage never having been done, even before the Revolution, how absurd the argument "What Pennsylvanian ever obtained his lands," etc. If he never obtained them thus before the Revolution, how is his never obtaining then since, a proof that the Revolution abolished the tenures to which homage was incident?

But, if the Revolution abolished the relation of lord and tenant, between the grantor and the grantee of a fee, how did the relation exist in Ingersoll v. Sergeant, 1 Wh. 337, so complacently cited with deference by Woodward, J? It was assumed in that case that the feudal relation existed, unless the statute *Quia emptores terrarum* was operative in Pennsylvania, and that statute was declared to be inoperative. If a conveyance in fee in 1811 reserving a rent, made the grantee a tenant of the grantor, and despite the Revolution of 1776 affixed feudal qualities to the reservation of rent, *inter alia* that in virtue of which a release of one portion of the land by the lord would not extinguish the entire rent, as to the other part, but only apportion it, how happened it that in 1838 that Revolution had made the relation of lord and tenant between a grantor and a grantee in fee, impossible? Is it to be wondered at that so great an authority as John Chipman Gray should exclaim.[13] "In fact Wallace v. Harmstad is unintelligible. To speak of rent service or of the statute Quia Emptores in

[12]3 Holdsworth, History of English Law, p. 50.
[13]The Rule against Perpetuities, p. 32.

a state where tenure is non-existent, is an absurdity; rent service and the statute Quia Emptores necessarily imply tenure. They are meaningless terms without it. Considering the high authority which has always attached to Ingersoll v. Sergeant, there may be reason, in spite of Wallace v. Harmstad, to believe that tenure still exists in Pennsylvania, and that the statute Quia Emptores does not."

Woodward, J., concludes, by such logic as we have examined, that lands are here held of the state "by titles purged of all the rubbish of the dark ages." We have only the "feudal names of things not any longer feudal."

If then the state was not the lord of Arrison, how could he, by conveying to Harmstad, become the lord of Harmstad?

The justice cites the legislation of the State, to show that it has abolished tenures. On Nov. 27, 1779, an act was passed for vesting the estates of the late proprietors of Pennsylvania in the Commonwealth. But this act simply put the Commonwealth in the relation to the lands of the State, which had been occupied by them. If they had been able, by granting the land, to establish the relation of lord and tenant, it acquired this ability. The statute did not profess to act upon the manors and lands which had been surveyed for the proprietors.

The Act of April 9th, 1781, provided for the opening of a land office and the grant of lands by the state, giving the form of patents. It then provided that all lands granted in pursuance of the act should be free of all restrictions as to mines, royalties, quit-rents or otherwise, so that the owners should be entitled to hold them in absolute and unconditional property. The feudal relation could exist without any duty to pay rent, so that exemption from quit-rents would not negative such relation. As E. Coppee Mitchell points out, the form of patent prescribed in this act after the habendum clause, in parenthesis, says

"Here insert the tenure and reservation," indicating that the framers of the act did not understand that it was abolishing tenure.

The justice refers to the practice of the State, in parting with its lands. "Instead of giving them like a feudal lord to an enslaved tenantry she has sold them for the best price she could get, and conferred on the purchaser the same absolute estate she held herself except one-fifth of the gold and silver, and six acres in the hundred for roads and these have been reserved, as everything else has been granted by *contract.*" When Arrison sold to Harmstad a lot worth $1000, for an annual payment of $60, the interest on $1000, was he selling to an enslaved tenant? If the state, instead of requiring the full payment of the value of the land, within a short time had agreed with the purchaser that he should pay, not the value, but the interest on the value, would it have constituted its purchaser an enslaved tenant? The justice italicizes the word "contract" under the prepossession that, under the feudal system, the king or lesser owner, when enfeoffing others, forced them to accept the feoffment.

Justice Woodward says that the patents issued by the Commonwealth "all acknowledge a pecuniary consideration, and they stipulate for no fealty, no escheat, rent-service, or other feudal incidents." E. Coppee Mitchell observes that the patents issued by the Supreme Executive Council for city lots prior to 1803 all contain a tenendum and a reservation to the commonwealth yearly, on the 1st day of September, of one acorn, if the same be demanded.

The justice half perceived the irrelevance of the statutes cited by him. The act of Nov. 27, 1779, which divested the estate of the proprietors, did not undertake to abolish ground rents which had been reserved, either by Wm. Penn or his successors, or by their grantees. It would not follow that lands which at the Revolution had ceased to

belong to the Penns, but which were charged with rents, would be discharged therefrom or that the character of the rents would be changed by the divesting of the estates of the proprietors, which existed at the Revolution. The history of the Arrison lots is not given. They may have been conveyed by the Penns long before the Revolution. How would the legislation then make the rent theretofore a rent-service, something else?

To the suggestion that the act of 1779 and 1781 were inapplicable to the lot in question, because Philadelphia had been laid out by the proprietors before the opening of the land office by the state, Justice Woodward refers to Judge Gibson's observations in Hubley v. Vanhorn, 7 S. & R., 184, where he justifies the expropriation of the Penns. He clearly shows what he means when he says "It was therefore necessary to extinguish all *foreign interest* in the soil, as well as *foreign jurisdiction* in matters of government."

The justice finally concludes that Mrs. Wallace's right of distress depends on the Arrison deed. He has discovered a case, Ward v. Lumley, holding that the lessor of an estate for years may recover the rent by the action of debt, although the lease has been cancelled by mutual consent. This case differs from Wallace v. Harmstad, he observes, (a) because the latter involved fraud, the other case did not; (b) the lease had left a reversion in the lessor, in Ward v. Lumley; and he could sue for the rent for this reason. In Wallace v. Harmstad, there was no reversion in Wallace.

The justice considers himself concluded by the earlier decision as to the inability of Mr. Wallace, though an innocent purchaser, to enforce the payment of the rent by distress.

The writer observes that he has not considered the effect of the statute of frauds; but expresses the belief that if it should be found applicable, the same conclusion would be reached as has been reached without it.

INGERSOLL v. SERGEANT, 1 WHARTON 337

Replevin by the owner of land, for goods which had been destrained by the owner of a ground-rent issuing therefrom.

In 1811 O'Conner and wife owning a tract of land in Philadelphia, conveyed it in fee to McIlwham, reserving to themselves and their heirs a yearly rent of $351, payable half-yearly, on the 1st February and 1st August and redeemable within ten years. This land was conveyed by its then owners, in 1814 to Joseph Reed in fee, subject to the rent. On October 9th, 1818, Reed and wife by bargain and sale deed for $11,250 conveyed the land to Charles J. Ingersoll, in fee, *habendum* to Ingersoll and his heirs and assigns, free and discharged from the aforesaid rent-charge, liens and incumbrances whatsoever. There was also a special warranty and a covenant by Reed that he would "extinguish the aforesaid yearly rent charge of $351 within the time limited to extinguish the same (less than three years remaining) or within any extended time for extinguishing the same, and in the meantime well and sufficiently save, defend and keep harmless and indemnified, the said Charles J. Ingersoll, his heirs and assigns from any charges, claims or demands whatsoever thereof." Ingersoll is the plaintiff. A few days after the conveyance of the land to Ingersoll, the wife and heirs of O'Conner, for $5850, conveyed the ground-rent of $351 to John Sergeant, Esq. in fee. Sergeant's purchase was made with money furnished by Reed who 22 days before had parted with the land to Ingersoll. Sergeant, thus the legal owner, (but subject to a resulting trust for Reed) on February 6, 1819 by writing on the O'Conner deed, agreed to extend the time for the redemption of the ground-rent for 10 years from that day.

On April 30th, 1819, Ingersoll and wife conveyed to Jonathan Smith in fee, a part of the lot which he had pur-

chased of Reed, described as "part of a larger lot or piece of ground which Joseph Reed and wife * * * * by indenture bearing date the 9th day of October, A. D. 1818, granted and conveyed unto the said Charles J. Ingersoll in fee, clear of all liens and incumbrances whatsoever."

On May 1, 1819, John Sergeant reciting that the rent was then vested in him, in consideration of one dollar, released and discharged the lot conveyed to Smith "from the payment of the said yearly rent-charge and every part thereof, and of and from all distress or distresses, actions * * * * on account of the same, and that the residue of the said recited large lot only, shall be held liable and accountable for the payment of the said yearly rent charge. Provided always nevertheless that nothing herein contained shall in anywise tend to impair or injure the estate and interest of the said John Sergeant, his heirs and assigns in and to the said yearly rent charge, or prevent the recovery of the same from the remaining part of the said recited large lot, but only the premises within granted." This release was made at the request of Mr. Reed.

On May 3rd, 1819, immediately after the release of Smith's part of the land, John Sergeant, Esq., and wife by deed of bargain and sale, reciting the O'Connor deed, and the reservation thereon of $351 annual rent, granted and assigned the said yearly rent-charge of $351 to Elizabeth Sergeant. She had no knowledge of Reed's interest in the rent, or of his request to Sergeant to execute the release.

Mrs. Elizabeth Sergeant having distrained for the rent, upon goods of Charles J. Ingersoll, (not of Jonathan Smith) the latter denying the duty of paying any rent, or if any was due, of paying so much as was distrained for, instituted this replevin.

Was the rent extinct? One suggestion is, that Reed became the owner of the rent, through John Sergeant's purchase, while he was still the owner of the lot of ground, out of which the rent issued. 1 Wh. 357, and that

"this union of ownership produced an extinguishment of the rent." "This conclusion," says Kennedy, J., "would be correct if the fact was only so." Reed had ceased to own the ground on October 9, 1818, when he conveyed it to Ingersoll. He did not become the owner of the rent until the conveyance of it to John Sergeant as a trustee for him on October 31st, 1818. There never was then a union of the estates in the same person.

Another suggestion is that Reed, in his conveyance to Ingersoll, had covenanted to extinguish the rent, and, meantime to save him harmless from any charges, claims or demands whatsoever. When then, Reed acquired the rent, it was in equity extinguished. Had Reed continued to be the owner of the rent this result would have followed. But his title has passed to Mrs. Sergeant who bought from John Sergeant, the legal owner, without notice of Reed's equitable ownership. (Had she known of Reed's ownership of the rent and had she known of Reed's former ownership of the land, and of his covenant to extinguish it, the situation would have been different).

It was urged that the extension of time for redeeming the ground from the charge of the rent, extinguished it. (1 Wh. p. 358). Two answers are made by Kennedy, J. 1st—The procuring of an extension of the time of redemption, was in conformity with Reed's covenant. It was to extinguish the rent within the time originally limited, 10 years, "or within any extended time for extinguishing the same." It does not distinctly appear at whose instance this extension was procured Feb. 6th, 1819, which was 4 months after Reed had conveyed to Ingersoll the lot. Although he had agreed to extinguish, he was to do so only within the original 10 years or an extension. His purchase of the rent, with the purpose to keep it alive was not "inconsistent with the letter of the covenant," "whatever may be thought of its spirit." He had the option to procure as many and as long extensions as he chose; but during the

life of the rent, he was bound to indemnify Ingersoll. 2d—Even if as against Reed himself, this procurement of an extension of time would have been an extension of the rent, had he never transferred it, how, asks Kennedy, J., could it affect Mrs. Sergeant's title to the rent? She had no knowledge of Reed's interest in the rent or of Reed's obligation to Ingersoll. She took the rent after paying a fair price for it.

The release of Jonathan Smith, or of the portion of the land that was conveyed to him, is alleged to extinguish the rent altogether.

1. The plaintiff compares the case to that of a debt by two partners in trade, or two joint obligors, a release given to one of whom discharges both. This however, says Kennedy, J., is because they were jointly liable, and to give such effect to a release of one, as to allow the liability of the other to survive, would be to transform the nature of that liability from joint to several. The liability of Mr. Ingersoll and Mr. Smith, on the conveyance to the latter by the former of a part of the lot, was "clearly several and not joint." The release of the latter could therefore not change the nature of the liability of the former, nor increase the extent of it. If the release is conceived to be of the land conveyed to Smith, then, since land is divisible, and susceptible of being made liable separately, according to the values of the respective parts, and since Ingersoll divided it, he cannot object that his act was consented to by the owner of the rent, John Sergeant.

2. The plaintiff compares the case to that of a piece of land subject to a mortgage, which is divided into portions, one or some of which are released by the mortgagee. He contends that in 1819, when the sale to Smith, and the release of the part sold to him, occurred, the release of a part of the mortgaged land would have released all, citing the act of April 22, 1822, as changing this law. This act provided that hereafter the mortgagee might release any

part of the premises to the mortgagor or assigns, and thereafter might proceed on the mortgage to recover the debt or so much of it as remained unpaid, out of the unreleased part of the premises. This act however, says Kennedy, J., was simply declaratory of what the law was before. But even if the release of a part of the mortgaged land released all, it would not follow that a release of a part of land out of which a ground rent issues, would release all the land from all the rent. The mortgage debt is a mere chose in action, entire in its nature. A ground rent is an inheritable estate divisible in its nature. The rent falling due annually is the fruit of it, which becomes payable only in consideration of the enjoyment of the land, which is also divisible in its nature. Kennedy, J., admits that it was at one time doubted whether a rent-service incident to a reversion could be apportioned by a grant of part of the reversion. This doubt did not remain long. Besides the division of the land was in this case, the act of the tenant in conveying to Smith a part of it. The desirability of treating ground rents as apportionable, by dividing the rent between two or more, without division of the land, or by dividing the land and consequently dividing proportionally the rent, is expatiated upon.

The nature of the rent, whether a rent-service or not, is regarded as decisive of the effect of a release of a part of the land. It is assumed by the opinion of Kennedy, J., that rents service are apportionable, by a division of the land out of which they spring, and rents not rents-service, are not thus apportionable.

Rents are of two kinds, rents-service and rents not rents service. The latter are divided into two classes, as express provision is made, or is not made, for the remedy of distress. That remedy exists, when it is stipulated for. The rent is then a rent charge. The rent is charged on the land, by the subjection of chattels on it to distress in order to compel payment of the rent. When no express provision

is made for distress for rents which are not rents-service, they are known as rents seck. The right of distress existed, although no stipulation was made for it in the case of rents-service.

Before the passage of the statute *quia emptores terrarum* when A conveyed land to B even in fee reserving a rent, the rent was a rent service, because the feudal bond existed between feoffor and feoffee. In cases in which a rent was created without such bond between the owner of the land and the owner of the rent, the rent was not a rent service. Thus A owning land and retaining it, could create a rent to issue out of it by a grant of the rent to B. There arose no feudal bond between them. The rent was not a rent service. After the passage of the statute *quia emptores terrarum,* when A enfeoffed B of land, B no longer held the land of A, or owed feudal duties to him. On the death of B, without heirs, the land would no longer escheat to A. That statute ordained that he B should hold not of A, but of the person from whom A held. Any feudal duties owed were owed to that person. Hence if A conveyed land in fee to B reserving a rent, this rent was no longer, as before the statute a rent service, but, if the right of distress was stipulated for, a rent charge, if that right was not stipulated for, a rent seck. If the statute *quia emptores terrarum* is operative in Pennsylvania, when A conveys land in fee to B, reserving a rent B does not hold of A, B owes no feudal duties to A, the rent then is not a rent service.

Does the statute operate in Pennsylvania? The decision is that it does not. Several reasons are given. (1) Long after the passage of that statute (1290) Charles II. granted to William Penn the charter for the province of Pennsylvania. That charter gave to him the power to grant lands to be held of the said William Penn, his heirs and assigns. It also provides that the purchasers from him should hold the estates granted the statute *quia emptores terrarum* in anywise notwithstanding. Hence Charles II

intended, infers Kennedy, J., that the statute should not operate in Pennsylvania. The implication is that whether the statute should operate or not in the colony depended on the will of the king. (2) Another evidence that the statute is not operative in Pennsylvania is the provision in the laws agreed upon between William Penn and the freemen of the province, May 5th, 1682, that all lands should be liable to pay the debts of the owners. Provision was made in later legislation for the sale of the lands of a decedent, for the payment of his debts. Thus the feudal right of escheat was clearly taken away, in favor of creditors. In 1700 an act was passed, providing for sale by the administrator of a decedent's lands, for payment of his debts, and directing that if he had no known kindred, the land unsold, for debts, should go to the *immediate landlord* of whom such land was held. This was in violation of the prohibition of subinfeudation, found in the statute *quia emptores terrarum.*

Another species of evidence that the statute is not effective in Pennsylvania, consists of decisions of the court. In Dunbar v. Jumper, 2 Y. 74, a vendor conveyed an acre of land to the vendee in fee, it being necessary for a grist mill of the vendee. The consideration was the vendee's yielding and paying to the vendor and his heirs of the body the privilege of grinding such grain as might be consumed by the vendor in his family, on the plantation he then occupied or the heirs of his body, free of toll, as long as the mill should be in order to grind. An action was held maintain-?able by the heir of the vendor against the assignee of the vendee, for refusing to grind grain toll free, for the plaintiff. If the statute *quia emptores terrarum* had been in force, the duty of grinding the grain would have been a rent charge, not rent service, and as a covenant to pay a rent charge does not run with the land (but why does it not?) it would not have bound the vendee's assignee. It was nevertheless held to bind him. The duty must then have been regarded as a rent-service; that is, the vendee must have

been conceived to hold the acre of land of the vendor, as he could not have done, if the statute had been operative.

Bantleon v. Smith, 2 Binn. 146, is also cited, and interpreted so as to exclude the existence of the statute *quia emptores terrarum*. The judges who made this decision had been appointed by the legislature to report all the British statutes in force in Pennsylvania. They did not report among such statutes that of *quia emptores terrarum*. Cases in which ground rents have been recovered in actions of covenant against the assignee of the covenantor imply that the covenant to pay such rents runs with the land, as it would not do, if it was a rent charge. Kennedy, J., concludes his discussion of this subject by remarking "I am inevitably brought to the conclusion that it (the statute) never had any existence here."

Independently of that statute, in a feoffment in fee, reserving a rent to the feoffor and his heirs, the rent was a rent service; a tenure was created between feoffor and feoffee. It was called a rent-service, because it was a compensation for the services for which the land was originally liable. Even to this day, says C. Baron Gilbert, the feoffee (the tenant) does the corporal service of fealty, and therefore it is still called a rent-service. (1 Wh. p. 352).

The reasons for holding a rent charge non-apportionable, do not apply to a rent-service. The rent-charge was repugnant to the feudal policy, because it was an incumbrance on the land, in favor of another than the lord, and rendered the tenant less able to discharge the services incident to his tenure. The courts refused to recognize the right to distrain for it, in the absence of a stipulation. With such disfavor was the rent charge regarded, that any act that could in any way be construed to be incompatible with the future assertion of the rent was held to be an entire extinguishment of it. A release of any part of the land, from the rent, was a release of all. The pur-

chase of a part of the land by the person entitled to the rent was an extinguishment of the whole rent, as to the part not purchased, as well as to the part purchased.

In the case of the rent service, the release or purchase by the rent owner of part of the land was not an extinguishment of the whole rent, when that rent was in its nature divisible, as, e. g. when it was a money rent. If it was indivisible, e. g. a hawk, a horse, etc., a release of part of the land was a release of all. "As a rent-charge issues out of every part of the land and consequently every part of the land is subject to a distress for the whole rent, therefore when the grantee (of the rent) purchases part of the land, it is become impossible by his own act, that the grant should operate in that manner, because it is absurd that the grantee (of the rent) should distrain his own lands (i. e. the part which he has purchased since he became owner of the rent-charge) or bring on assize against himself." When John Sergeant released the land bought by Jonathan Smith, he affected the rent, only as he would have, if he had become the purchaser of that land instead of Smith, or from Smith. If he had purchased that land, he would have extinguished such part of the rent as would be expressed by a fraction the numerator of which would be the value in money, of the part purchased and the denominator, the value of the whole tract.

The jury had not found what these values were. The court decided that a new trial would be necessary, in order to find them, unless the parties would agree to take the price viz. $11,250 at which the land was sold to Ingersoll, the plaintiff, as the value of the whole tract, and the price viz $2500, at which Ingersoll sold a part to Smith, as the value of that part.

It does not appear whether, since Smith paid a full price for the land sold to him by Ingersoll, the latter paid to John Sergeant a proportional part of the principal sum represented by the rent, or any money at all. Did Sergeant release without consideration, thinking the whole

rent would be payable from the residue of the tract? Did he release in consultation with, at the request of, Ingersoll and without receiving anything? (The release was dated the day after the conveyance to Smith). If he did, and the understanding was that the whole rent should be payable out of the part of the land retained by Ingersoll, why was there any apportionment at all? Could a parol understanding avert the application of the principle of apportionment?

MOOT COURT

LAPORTE v. R. R. CO.

Injury to Child—Measure of Damages—Effect of Death on Action Brought Before

STATEMENT OF FACTS

The defendant had allowed the public to cross its tracks by a certain path for several years. Plaintiff only two years old, was crossing the track, on this path, when it was run into by a locomotive, and one of its legs was so seriously hurt as to require amputation. It recovered from the shock and lived two years longer when it died of some disease. Before its death an action against the railroad company had been brought for negligence in causing the accident; in not whistling or ringing the bell; and in traversing the path at a high speed. The Court allowed the jury to award damages for pain and suffering, but not for reduction of earning power or expense of nursing and medical attention. The child died before the trial.

Farrell for plaintiff.

Setzer, for defendant.

OPINION OF THE COURT

McGUIRE, J. There are two questions to be decided in this case: 1st, Did the Court err in permitting the jury to award damages for pain and suffering? 2nd, Did it again err in not permitting the jury to award damages for reduction of earning power and expense of nursing and medical attention? To both of these questions we must answer in the affimative. As this action was begun before the death of the child, it is fair to assume that it was conducted in a legal manner, and according to recognized practice. The Act of April 15, 1851, (P. L. 699), Sec. 18 provides: "That no action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representative may be substituted as plaintiff and prosecute the suit to final judgment and satisfaction." The child being a minor the father of such would have to begin the suit, by having the child plaintiff and the father next friend. Would the subsequent death of the child, have any

bearing upon the damages recovered? We contend that it would, as far as the pain and mental suffering is concerned; but not with regard to reduction of earning power, and expenses for nursing and medical attention.

Judge Woodward in Penna. R. Co. v. Kelly, 31 Pa. 372, says the damages must be compensatory merely and that compensation must have regard to the plaintiff's loss of his service and to the expense of nursing and medical attention. The father was entitled to the services of his child during minority, and by just so much as this injury impaired the value of this right was he entitled to compensatory damages; and that it was proper for the jury to understand that the suffering endured by the boy, and the disfiguration of his form, and whatever was merely personal to him, should not enter into the father's damages.

P. R. Co. v. James and wife, 81½ Pa. 194, where the action was for the death of a child six years of age, the court said: The measure of damage is the pecuniary loss to the parents. It is confined to the actual outlay or direct pecuniary loss, namely, the funeral expenses, doctor bills and the present probable value to be determined by the evidence, of the service or earnings of the deceased from the time of his death up to twenty-one years of age. You cannot allow anything for the mental suffering of the parents, or any other suffering other than the pecuniary loss.

Had the child survived the injury, and lived for a considerable number of years, it is possible that damages for mental suffering and pain would have been awarded; but, death occurring, before the trial, and the pain and suffering being personal, no jury would be justified in awarding damages to the father. Again, we might ask, how are such damages to be computed in dollars and cents? The child being dead, there is no accurate way to determine whether the pain and suffering was worth fifty thousand dollars, or one cent. And we are unaware of any means adopted by physicians or psychologists, to inform us precisely, what is the money value of a person's suffering and pain.

In P. R. Co. v. Zebe et ux, 33 Pa. 318, the court held, that the jury should have been instructed that if the plaintiffs were entitled to recover, it was for the damages done in producing the death of the son and that this was to be estimated by the pecuniary value to them of his services during his minority, together with expenses of care and attention to the deceased arising out of the injury, funeral expenses and medical service if any. This excludes damages for the suffering of the deceased which was personal to himself,

and did not survive, as well as for solace which are incapable of appreciation, so as to be compensated.

McCleary v. Pittsburg Ry. Co., 47 Superior 366, the court held that the case should have been submitted to the jury with instructions to take into consideration the facts in evidence and to determine from them what was the probable expectancy of life of the deceased child x x x x and then to estimate the pecuniary value to the plaintiff of that life during minority and thus arrive at the damages which the plaintiff ought to recover.

Cosgrove v. Hay, 54 Superior 175. In making an estimate of the value of a life and consequent damages by death much is left to the sound discretion of the jury.

There is one very important English case which clearly establish the fact that the law in England is in accord with that in Pa.

Blake v. Midland Ry. Co., 10 Eng. L. & Eq. R. 437, holds that a jury in determining damages "are to be confined to injuries of which a pecuniary estimate can be made, and cannot take into consideration the mental suffering occasioned to the survivors by the death" and that nothing may be allowed as solatium, that being incapable of a pecuniary estimate, nor for the suffering of the injured party.

We do not think that the fact that the child died of some disease, is of much import to the case. If the disease was the direct result of the injuries sustained, the question of damages would not be affected sufficiently to warrant our consideration.

Judgment reversed, and v. f. d. n. awarded.

OPINION OF SUPREME COURT

The injury was to a child. For this injury, an action was brought by the child. Had it not died, before the trial, it would have recovered for the pain and suffering which it suffered. Ehly v. Phila. & Reading R. R. Co., 56 Super. 572; Maher v. Traction Co., 181 Pa. 396, and for the loss of earning power, during what would probably have been the years of its life, had the accident not happened. The child has died before trial, but its administrator has been substituted for it. The action has not abated. Act of April 18th, 1851. Maher v. Phila. Traction Co., 187 Pa. 391; and the administrator may recover what it would have recovered, had it not died.

The child's death makes speculation unnecessary as to its probable length of life. It died from another cause than the accident. We know that it had no earning power, and therefore its earnings have not been reduced by the accident.

The expense of nursing and medical attendance was not a loss to the child, but to its parents. The father, not it, could recover for this.

Was the defendant the cause by its negligence, of the accident? The engineer did not whistle, nor ring the bell. Probably if it had, the warning would not have been heeded by so young a person. The negligence, then, of omitting to ring or whistle, would not have been the cause of the accident, if it would have happened had there been, in this respect, no negligence.

The defendant knew that the public was in the habit of crossing its tracks. The duty was on it therefore, to lessen its speed, and had it done so, possibly the child would have escaped harm, by the arrest of the train before it reached the child, or by the rescue of it by some passer-by. Cf. remarks of Head, J., in Ehly v. Phila. and Reading R. R., 56 Super. 512.

The learned court below has found it difficult to permit an appraisement, in terms of money, of pain and suffering. It would be, if possible, still more difficult to value in dollars the loss to one's self of one's own life. Yet, that damages can be allowed to the personal representative of one who has been mortally injured for his death, in an action brought between the suffering of the injury and the death, has been affirmed. Maher v. Phila. Traction Co., 181 Pa. 391; Moe v. Smiley 1,25 Pa. 141; Penna. R. R. v. Zebe, 33 Pa. 318; R. R. v. McCloskey, 23 Pa. 526. As no damages were sought in this case for the extinction of the defendant's life, it is unnecessary for us to perplex ourselves with the problem of pecuniary estimating the value to one of his own life.

No sum having been committed by the trial court, the reversal of its judgment was an error.

The judgment of the Superior Court, reversing that of the trial court is therefore reversed, and that of the trial court affirmed.

DOYLE, RECEIVER v. FLOYD

Mutual Insurance Co. Assessments Fraud to Induce Entrance Into Company

STATEMENT OF FACTS

The Insurance Company being insolvent, Doyle has caused an assessment on Floyd and other members, for the purpose of paying losses for which the Company is liable. Floyd defends by showing that he was induced to take insurance in the company by fraudulent

representations of its president, secretary and treasurer, concerning a reserve fund, and the number and character of its members. The court instructed the jury that the fraud being established, it would not avail Floyd unless it appeared that none had become insured in the company, since Floyd, to whom the company was still liable for fires that had actually occurred on the policies that had not yet expired. The court added that the burden of proving that there was no such obstacle to his taking advantage of the fraud, was upon Floyd. Verdict for plaintiff. Motion for a new trial.

Lee, for plaintiff.

Goldin, for defendant.

OPINION OF THE COURT

BLUMBERG, J. In order to dispose of this motion for a new trial it becomes necessary to consider the following questions:

(a) What is the status of a contract entered into through fraudulent representations? (b) Upon which party does the onus probandi rest to show the fraudulent representations?. (c) And upon whom does the burden rest of showing that there were intervening equities or no intervening equities?

As to the first question, the weight of authorities both in United States and England is to the effect that, "subscriptions procured through misrepresentations or fraud are voidable only, and not void, and can only be avoided subject to rights of creditors or intervening equities, where there is a winding up order or a voluntary winding up." Bispham's Equity, Sec. 472; 2 Addison Contracts (eighth edition) 774; Cook on Stocks, etc., Secs. 151 to 154; Clark on Corporations, Sec. 101.

The intervening rights of creditors and other stockholders call for prompt action on the part of a subscriber who seeks to avoid his liability on the ground of fraud. Bispham's Equity, Sec. 154; Howard v. Turner, 155 Pa. 349 (1893).

Therefore the law as applicable to the case at bar is that the contract is voidable provided that fraud can be shown and that there are no intervening equities. Upon which party does the onus probandi rest to show the fraudulent representations?

This question necessarily presumes that there was fraud used, but that the defendant was not guilty of laches. The law is well settled that the burden of showing fraud in cases where a suit is brought to enforce a stocksubscriber's liability, is upon the party alleging the fraud, here the defendant. It is not sufficient for the defendant to allege mere expressions of opinion in his affidavit of defense. It must aver a distinct statement of the fact, or

thing misrepresented or fraud used, which if such were false, would justify a rescission of the contract.

Phila. Bourse v. Downing, 6 Sup. 590 (1898). Where a contract of subscription is absolute, a defendant must, in order to prevent a judgment do more than simply state in his affidavit the general terms that false and fraudulent representations were made. He must set forth what the false representations were, and state wherein they were false, and that he was deceived. 10 Sup. 61 (1899) Acetylene Light, Heat and Power Co. v. Smith; Acetylene Light, Heat and Power Co. v. Beck, 6 Sup. 584 (1898).

Omission to repudiate a fraudulent sale or contract, in order to escape liability, within a reasonable time, is evidence of an election to affirm the contract. What is reasonable time is a matter of law. Acetylene Heat, Light and Power Co. v. Smith, 10 Sup. 61.

The facts in the case at bar do not disclose when the defendant became a subscriber or member of the corporation, or how long after his membership, this action is brought. But it is not necessary for us to decide whether or not the defendant did remove his liability by rescission within a reasonable time.

It is upon a decision as to the last question, as to whether or not the motion for a new trial will be made absolute or discharged. The pertinent question is, "Are there any circumstances in the case which make it impossible for the defendant to release himself from liability?" Where the rights of creditors and stockholders have intervened since the making of the contract, the defendant cannot escape liability. Dettra v. Kistner, 147 Pa. 566 (1884); Dettra v. Lock, 5 D. R. 200 (1895); State Mutual Ins. Co. of Harrisburg v. Smith, 1 Sup. 170 (1894).

The burden of showing that intervening equities exist, is upon the plaintiff in the case at bar. This necessarily follows from the peculiar situation of the parties and from observance of the rules of evidence. The plaintiff is in a much better position to know whether or not intervening equities have arisen; furthermore it is absolutely essential for a verdict in his favor for him to show that there were such rights intervening. This is commonly known as the burden of proof in the primary sense. Van Dyke v. Baker, 214 Pa. 168 (1906)

The instructions to the jury were erroneous for two reasons: (1) The plaintiff did not show whether the losses had occurred before or after the defendant's membership. If the losses had occurred before the defendant had become a member, then the defendant could not be held liable for such losses, provided that this rescission should take place in a reasonable time. In the case at bar

there is nothing to show when the losses occurred. (2) The burden of showing that there were intervening equities is upon the plaintiff, not on the defendant. The burden cannot be shifted to the defendant. Van Dyke v. Baker, 214 Pa. 168 (1906).

In view of the above facts and cases, the motion for a new trial must be granted.

OPINION OF THE COURT

Prima facie, Floyd is liable to an assessment in order to pay for losses that occurred during his membership.

He alleges fraud in inducing him to become a member, and he furnishes satisfactory evidence, which he was under the burden of doing, of this fraud.

Fraud alone will not excuse Floyd from paying. It must also be the fact that others have not become members and have not suffered losses, since his own membership began. But will the accession of members, since Floyd's membership began, and the occurrence of losses, be assumed, in the absence of evidence? Clearly not. On whom then is the burden of showing whether such accession o fmembers, etc., have occurred. Plainly on the party to whose success accession is necessary. Floyd was defrauded. He has a right to rescind the contract in consequence, unless certain things have happened. The happening of these things must be shown by the plaintiff who wishes to defeat the effort at rescission. The learned court below, far from insisting that the plaintiff should furnish proof of the happening of these things, distinctly said to the jury that the burden of proving it was upon Floyd. In this was error, as the learned court below has decided. Van Dyke v. Baker, 214 Pr. 168. Cf. Tanner v. Weber Co., 59 Super. 14.

The judgment of the learned court below is affirmed.

JANTON v. ALLIGAN

Sale of Morphine to Husband—Insanity Superinduced—Wife's Right To Sue

STATEMENT OF FACTS

Alligan sold morphine to plaintiff's husband, in spite of her repeated protests, until by its use he became insane.

Goldsmith, for plaintiff.

Bolger, for defendant.

OPINION OF THE COURT

The first and main question here, is whether a wife has a right of action, at Common Law, against one who wrongfully deprives her of the society, companionship, and consortium of her husband. In the absence of statutes authorizing a recovery, this matter rests entirely with the common law.

The common law formerly, was to the effect that a wife could not sue for the loss of consortium of her husband. (Blackstone vol. 3 pp. 142-143). The husband, the head of the family, was the only member deemed to be harmed by an injury to any part of it; hence could be the only one to recover. In Lynch v. Knight, (8 Eng. Ruling Cases 382), it was held that a wife could not recover for an injury to her husband. Since the time of Lynch v. Knight, the law, in resepct to married women, has changed. The Act of 1893, gave her a right to sue and he sued in her own name.

It may be easily seen, that the trend of the legislature is to better the condition of married women; and, now a married woman can hold property in her own name, sue in her own name, and in fact, as she has all the other statutory rights of the man, except that of sueing for the consortium of the spouse, in this class of cases she should have that right.

The reason a recovery for loss of consortium was denied the wife, in Lynch v. Knight, was, that the damages would go to the husband, who was in a way at fault. This would open up a way to fraud, and against this all law is directed. Therefore the Latin maxim "Cessaute ratione, cessat ipsa lex," (the reason ceasing, the law itself ceases), applies. The wife being now able to hold the damages and the husband being unable to take them from her; she should recover for the loss of the companionship, society and consortium of her spouse. This same doctrine has been held by Gernerd v. Gernerd, 185 Pa. 233. The first paragraph of the syllabus reads, "a wife may maintain an action against one who wrongfully induced her husband to leave her." Burdick, in his Law of Torts, on page 276, says, "with this change in her legal status came naturally a change in judicial conception of her marital wrongs. As she could maintain an action in her own name, the damages recovered would be her sole and separate property, one of the chief objections urged by Lord Wensleydale (Lynch v. Knight) disappeared. As the law now recognizes her legal equality with her husband, Blackstone's reasoning, based upon the superiority of one party, and the inferiority of the other party, to the marital relation had no longer a foundation of even principal." Other eminent authorities uphold this opinion. Hale on Torts (page 278), and Cooley on Torts (Students Edition, p. 257). For this principle

Mr. Cooley cites, Reading v. Gazzam, 200 Pa. 70, which holds "to entice away or corrupt the mind of one's consort is a civil wrong, for, which the offender is liable to the injured wife."

The defendant contends, that as the drug was purchased from a licensed druggist, and that as the sale of morphine was within his rights, even though warned by the wife, the druggist committed no unlawful act, and that the insanity was not the proximate, but the remote cause of the druggist's act in selling morphine.

It is true that the druggist did not inject the morphine into the veins of the husband. But when a man becomes addicted to a drug, he has neither the inclination nor the will power to refrain from its use, when he has easy access to it. It is shown by the insanity which followed his acts in procuring morphine that the plaintiff's husband was in a weakened condition. The defendant knew of this condition, on account of the repeated protests of the wife, who begged him to spare her, her husband, whose strength of mind and body was being steadily sapped by morphine sold by the druggist to a man unable to refrain from its use; a man who subsequently became insane on account of the use of this narcotic. The sale of morphine, here is the proximate not the remote cause of the insanity. Flandemier v. Cooper, 85 Ohio 327.

If the defendant's act was a lawful one in selling morphine to the husband of the plaintiff before he, the defendant, knew an injury was being sustained; it was surelp an illegal act to sell morphine to a man who was a habitual user, and unable to guard against the degenerating effect coming upon him. The Act of 1909, p. 487 (in re sale of cocaine) makes it a crime. It is surely a civil wrong to ruin the life of a man in order to attain a pecuniary benefit for the wrong doer. Although this is not so enunciated as a principle of law, never the less in good conscience and for the safety of the public, it seems to be but just and reasonable that it should be so construed.

It is evident that by the marked progress which our legislature has made in propounding and enacting statutes by means of which a wife is entitled to maintain an action against a person who is engaged in the sale of liquor to an inebriate after he has been warned against the furnishing of the same, by the wife, that it is the gradual tendency of both the tribunals and legislature of this state, to provide means of protection to the wife, against those who intentionally violate these provisions as well as provisions which are similar in nature.

Can it be said that it is a more serious offence to sell liquor to a man, after having had due warning, than it is to furnish him with morphine under the same circumstances? Obviously, no! It is un-

doubtedly true that the effects produced by the use of morphine are by far more serious than those brought about in the use of liquor. It is not at all dubitable but that the legislature will within a very short time pass legislation which will be applicable in a case of this nature. For the present it will be obligatory and incumbent upon the courts to give relief in this class of cases, wherein our legislature has been somewhat slothful. (Act of May 8, 1854. 2 P. & L. 4680 in re sale of liquor); Littell v. Young, 5 Sup. 205.

By the Act of June 26, 1895 (P. L. 316) "a married woman who is the mother of a minor child and who contributes by the fruits of her own labor otherwise, towards the support, maintenance and education of her said minor child, shall have the same equal right to its custody and service as is now by law possessed bp her husband who is the father of such minor child." In the case of O'Brien v. Philadelphia, 215 Pa. 407, a deserted wife was held to have an action against a third party for the loss of services of her minor child. In Crowley v. Pennsylvania R. R. Co., 231 Pa. 268, a widow was held to have the same rights. "A fortiori," the right of a wife to sue for the loss of the society, companionship and consortium of her husband, her main support and livelihood, should no longer be withheld in this class of cases.

Judgment therefore for the plaintiff.

OPINION OF SUPERIOR COURT

The consortium of the husband has a money value to the wife, as has that of the wife to the husband. Dunham v. McMichael, 214 Pa. 185; Reading v. Gazzam, 200 Pa. 70; Gernerd v. Gernerd, 185 Pa. 233. The dictum in Quinn v. Pittsburgh, 243 Pa. 521, that "the right to recover for loss of companionship is confined to cases where a husband sues for injuries to his wife," probably needs qualification.

The wife may be deprived of it, by the withdrawal by the husband of his society and assistance. This withdrawal may be induced by influence exerted on the husband by a male friend, a father, etc., or by a woman who insinuates in him an interest in her with the result that as this interest waxes, that in the wife wanes, and finally is extinguished. In 185 Pa. 233, supra we have a specimen of the former, and in 214 Pa. 485, an instance of the latter.

The use by one of any art for the purpose and with the effect of producing the husband's estrangement, is, generally speaking, an actionable wrong to the wife. The methods ordinarily used are psychical. They consist of statements lodging beliefs or suspicions in the husband's mind, which disparage the wife, or of the

awakening of emotions and passions towards the rival which overwhelm the earlier affection for the wife.

The wife may lose the consortium, the aid and comfort, the society of the husband, otherwise than by his separation in space from the wife, in consequence of his charged opinions and feelings. The husband may remain at home, and yet his mind may be put out of contact with domestic affairs, with wife and children, by drugs which act physically on his brain and nervous system. His consciousness of his family may grow dim, through repeated ingesta of narcotics until his interest therein expires. His society becomes, to his wife and children, a source, not of pleasure, but of pain. Instead of yielding a support to his wife, he becomes a burden upon her. In the case before us the husband has become insane. The loss of consortium is total. There should as much be redress for it, when thus caused as when caused by direct appeals to the mental or emotional nature.

A disaster has been wrought to the plaintiff. How was it wrought? The defendant though repeatedly warned by the wife, continued to supply the husband with morphine until insanity supervened. His motive was, to make the profits on his sales. He was so eager to make these profits as to be indifferent to the grave damage his acts would inflict on the immediate victim and through him, upon the wife. We are of opinion that the law ought to furnish the wife a remedy. The law is the will of the legislature or the judges. The failure of the legislature to form and express a will, is no sufficient reason for the refusal of the courts to form and express one, as the history of the evolution of the law abundantly shows.

We frankly concede the absence of many authorities for the extension of a remedy to the wife. On the other hand, refusals of remedy to her are not many. In Hoard v. Peck, 36 Barbour 202, the Supreme Court of New York allowed a husband to recover, from the vendor of laudanum, for the effects upon his wife, of the consumption as a beverage of that drug. This was as long ago as 1867. The court observed, "The very sale to her of the poison, and the using it as she did, destroyed her volition and so perverted her judgment that she had no moral power to resist the temptation to continue its use, etc."

Hoard v. Peck was a suit by the husband for the sales of laudanum to the wife. It would be a reproach to the law, that is to the judges, if a wife's rights in this respect were not deemed similar to those of the husband, and if she was not furnished with equally efficacious remedies. Since writing the above, our attention has been

called to Hollerman v. Harward, 25 S. E. (N. C.) and Flandermeyer v. Cooper, 98 N. E. 102 (Ohio). In the former, a recovery was allowed by a husband, against a druggist, for selling laudanum to a wife, until she became a victim of the opium habit, and the husband lost her service and companionship. In the latter case the recovery was by the wife for selling morphine to the husband, until he became insane and she thus lost the benefit of consortium. The former case mentions Hoard v. Peck as the only precedent found.

Approving, as we do, the reasoning of the learned court below, the judgment is affirmed.